

2009

## Amber Klein v. Marysville Town : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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AMBER KLEIN,

Plaintiff and Appellant,

VS.

MARYSVALE TOWN,

Defendant and Appellee.

Appellate Case No. 20090490

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APPELLANT'S REPLY BRIEF

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On Appeal from the Sixth Judicial District Court of Piute County, Junction Department

Case No. 070600008, Judge Paul D. Lyman

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ORAL ARGUMENT REQUESTED

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## **PARTIES IN THE COURT BELOW**

The caption lists all parties to the proceedings below.

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## **APPELLANT'S REPLY ARGUMENT**

Appellant (referred to herein as "Plaintiff") submits the following response to the positions taken in Defendant Marysvale Town's (referred to herein as "Marysvale Town" or "Defendant") Appellee Brief. Based on the briefs, the need for reversal and remand shows itself unequivocally.

### **I. THE RECORD CLEARLY DEMONSTRATES THAT THERE ARE MATERIAL FACTS IN DISPUTE.**

The record below demonstrates that there were at least two material factual issues in dispute. First, there was a factual dispute about whether the accident occurred on the Marysvale Town road system and/or Piute ATV trail system, or on a side-trail that is separate and apart from the Marysvale Town road system and/or Piute ATV trail system. [R. 1-5, 29-33, 67-81, 42-66], [Tr. 10, 11, 12, 14, 27, 29, 31]. Second, there was a dispute about whether the side trail was "opened" to the public for recreation purposes. [R. 1-5, 29-33, 67-81, 42-66], [Tr. 10, 11, 12, 14, 27, 29, 31].

Defendant Marysvale Town takes the position that the District Court established a set of material and determinative facts that were not effectively disputed by Plaintiff.

The District Court determined that the following facts were undisputed:

1. The road near where the accident occurred is a Marysvale Town road. [R. 30].
2. Marysvale Town has opened the road to ATV use, and it functions as part of an official ATV trail. [R. 56].

3. The land where the accident occurred is owned and controlled by Marysvale. [R. 30].
4. The land where the accident occurred is adjacent to the Marysvale Town road. [R. 56].
5. The side trail where the accident occurred was for cattle and horse access. [R. 57, 59].
6. A sign was posted on the road where the accident occurred to allow for ATV use on the road. [R. 56].

These stated facts, however, are unhelpful because they are confusing and fail to adequately reflect the record.

First, the facts are confusing. The six (6) facts listed above variously describe the site of the accident as "the road," "the land," and "the side trail." The Marysvale Town Road is also referred to in the six (6) facts listed above as "the road." The District Court interchanges these terms in such a way that it is difficult to ascertain exactly what facts are undisputed. For example, the site of the accident is clearly near a Marysvale Town road (see facts #1 and 4 above), but is it the Marysvale Town road or the "road" where the accident occurred that is open to ATV (see fact 2 above)? It is clear that the side trail where the accident occurred was open for cattle and horse access (see fact #5 above), but it is unclear whether the sign allowing ATV use is posted on the Marysvale Town road or the "road" where the accident occurred (see fact #6 above.) The confusion demonstrated by the District Court's statement of undisputed facts is crucial because the confused facts



fail to answer *the* most important question: did the accident occur on property that was open to the public for off-highway recreational vehicle use?

Second, the undisputed facts provided by the District Court do not adequately reflect the record. The stated facts imply that there was no dispute about whether the "side trail" was part of the Paiute ATV trail and no dispute about whether the side trail was open to off-highway and/or recreational use. These facts, however, were very much in dispute below. Defendant's position was that the side trail where the accident occurred was actually part of the main Paiute ATV Trail, and open to off-highway recreational use [R. 42-66], [Tr. 14]. Plaintiff's position was that the side trail was not part of the Paiute ATV trail, and was not open to off-highway recreational use. [R. 1-5, 29-33, 67-81], [Tr. 10, 11, 12, 27, 29, 31].

Defendant takes the position that Plaintiff failed to present evidence to create genuine issues of fact or to counter the facts established by the Town in support of its motion for summary judgment. The basis for Defendant's position is presumably the fact that Plaintiff attached narratives and not affidavits to her memorandum in opposition to Defendant's Motion for Summary Judgment. Plaintiff does not dispute the District Court's decision to disregard Plaintiff's narratives.

Plaintiff did, however, also present issues of disputed fact that were supported by the pleadings, depositions, and admissions on file with the District Court. See Utah R. Civ. P. 56(c). To name only one prominent example, Plaintiff, in support of her position, pointed to the deposition of Gary James, Mayor of Marysvale Town; wherein Mayor

James testified that the side trail where the accident occurred was not open or intended to be used for off-highway vehicles or recreational use. [R. 25-26, 67-81, 108-113], [Tr. 31].

Mayor James' statement alone creates a disputed issue of material fact. Defendant claims that the side trail was part of the Marysvale Town road and, as such, open to the public for off-highway vehicles and/or recreational use. This disputed fact is material because the application of both the Utah Limitation of Landowner Liability Act and the Utah Off-Highway Vehicle Registration Act are conditioned upon the landowner or municipality opening its property for off-highway use or recreational use. If the land was opened for off-highway or recreational use, the Utah Limitation of Landowner Liability Act and the Utah Off-Highway Vehicle Registration Act are applicable, and Defendant is protected from liability for Plaintiff's damages. If the land was not opened for off-highway or recreational use, the Acts do not apply, and Defendant can be held liable for Plaintiff's damages. Plaintiff's position is that Mayor James' deposition, at the very least, creates a disputed issue of material fact that the District Court erred in disregarding.

**II. DEFENDANT'S AND THE DISTRICT COURT'S RELIANCE ON THE DEFINITION OF STREET IN THE OFF-HIGHWAY VEHICLE REGISTRATION ACT IS MISPLACED BECAUSE THE DEFINITION DOES NOT HAVE BEARING ON THE FACTS OF THIS CASE.**

Both the District Court and Defendant rely heavily upon the definition of "street" in the Off-Highway Vehicle Act. Defendant's position seems to be that the site of the accident is owned by Marysvale and is very near to a road that has been designated for ATV use by the town of Marysvale. Defendant argues that the broad definition of street

in the Off-Highway Vehicle Act has the effect of designating the site of the Accident for ATV use. The District Court appears to have accepted this argument.

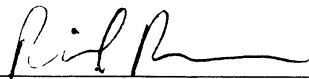
The District Court's and Defendant's reliance on the Act's definition of "street," is unnecessary. In this matter, there is no question that the side trail where the accident occurred was not open for off-highway recreational use because Gary James, the Mayor of the Town of Marysville, testified that the side trail was open only for cattle and horse use. [R. 67-81, 108-113], [Tr. 31]. According to the *Off-Highway Vehicle Registration Act*, the determination of whether a piece of property is "open" is not to be determined by the interpretation of statute or by a court—it is to be determined by the municipality or owner who owns the relevant property. Mayor James' pronouncement that the side trail was for cattle and horses is determinative: the side trail was not "open" and thus, the liability immunity provided by the *Off-Highway Vehicle Registration Act* and the *Utah Limitation of Landowner Liability Act* is inapplicable to this matter. Plaintiff's position is that the District Court erred in ignoring this disputed material fact and granting summary judgment.

### CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court overturn the District Court's decision granting Defendant's Motion for Summary Judgment.

DATED this 10<sup>th</sup> day of February, 2010.

VAN COTT, BAGLEY, CORNWALL & McCARTHY



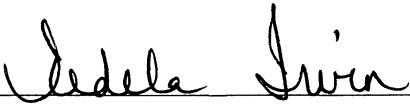
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the within and foregoing  
*APPELLANT'S REPLY BRIEF* to be mailed, postage prepaid, this 19 day of February,  
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